

The Appeals Board finds that claimant's back injury occurred on or about October 23, 1995 and that he advised the respondent on November 13, 1995 that he injured his back at work. Although claimant did or initially relate his back and leg symptoms to a work-related incident nor report an accident to the respondent, the respondent was aware that claimant was experiencing back problems as early as November 1 or 2, 1995.

The testimony of Mark Ysidro, respondent's owner, directly contradicted claimant's testimony. In awarding benefits the Administrative Law Judge must have found claimant a credible and persuasive witness. Because the Administrative Law Judge had the opportunity to observe both claimant and Mr. Ysidro testify and assess their demeanor, the Appeals Board gives some deference to the Judge's assessment of their credibility. Based upon the content of the doctor's medical notes, the Appeals Board notes that Dr. Eyster also found claimant to be credible. Dr. Eyster's notes, dated December 5, 1995, contain the following:

"After taking an extensive history from him, his only past back problem was approx. 17 years ago when he was lifting and he got better from this strain and has had no problems until the last few weeks when he was lifting up a heavy dolly lifting and twisting from a dead lift all at the same time and heard a pop in his back. I think this is probably when his annulus developed a tear. He had pain that day and he did not have much pain for the next couple of days but gradually as the disc protruded through the tear then he started to have symptoms. I believe the pt. and I believe the history that he gives me is true and, with his history, I think his symptoms are probably work related."

Because claimant is credible, the Appeals Board finds his version of the facts surrounding this injury to be true. The Appeals Board finds claimant did not initially realize he had injured his back while lifting heavy equipment onto his tow truck approximately one week before October 30, 1995. The Appeals Board also finds that claimant did not initially associate the increased symptoms he experienced on or about October 30, 1995 with the earlier lifting incident until he began receiving medical care and had spoken with his doctors. Claimant's failure to associate those increased symptoms to the lifting incident is reasonable under the facts presented.

Although claimant did not tell the respondent he had definitely injured his back at work until November 13, 1995, which is more than ten days after the lifting incident, the Appeals Board finds claimant has established just cause for failing to comply with the ten-day notice requirement of K.S.A. 44-520. Therefore, the claimant had 75 days from the date of accident to provide timely notice of the incident to the respondent.

Just cause is established because the initial lifting incident did not immediately cause symptoms of such severity or character to cause claimant to believe he had suffered injury or accident as those terms are defined by the Kansas Workers Compensation Act. In addition, the initial resolution of claimant's symptoms and their later gradual progression prevented claimant from immediately associating his symptoms with the lifting incident. Claimant had no experience with the Workers Compensation Act and was unaware of its notice requirements. Further, there was no evidence presented that respondent had posted the required notices concerning on-the-job injuries as required by K.A.R. 51-13-1.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Shannon S. Krysl dated March 12, 1996 should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

c: Michael Madden, Wichita, KS
Michael Streit, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director